In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-277

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 1, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-32) is reported at 438 F.2d 679. The district court did not issue an opinion; its order (Pet. App. 33-34) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1971. A petition for rehearing was

denied on March 16, 1971. The petition for a writ of certiorari was filed on June 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether in a lawsuit filed by the Attorney General under Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6(a), the defendant may inquire into and secure judicial review of the basis upon which the Attorney General, prior to the filing of the complaint, determined there was "reasonable cause to believe" the defendant was engaged in a pattern or practice of racial discrimination.

STATUTE INVOLVED

Section 707(a) of Title VII of the Civil Rights Act of 1964 (P. L. 88-352, Title VII, § 707(a), July 2, 1964, 78 Stat. 261; 42 U.S.C. 2000e-6(a)), provides in relevant part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter * * * the Attorney General may bring a civil action in the appropriate district court of the United States * * *.

STATEMENT

This action was commenced on April 12, 1968, by the filing of a complaint pursuant to Section 707(a),

42 U.S.C. 2000e-6(a), of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) against petitioner union. The complaint, signed by the Attorney General, alleged that the union discriminates against Negroes with respect to union membership and job opportunities (Vol. I. 2; Pet. 4).[1] The union's answer set forth certain defenses, including, *inter alia*, that the Attorney General lacked reasonable cause to believe that the union had engaged in a violation of Title VII.

The district court held that the issue of the Attorney General's determination of reasonable cause is subject to judicial review and, accordingly, overruled the government's objections to interrogatories directed to that question (Vol. I, 10; Pet. 6). Subsequently, the union also served a subpoena duces tecum upon the United States seeking to obtain, among other documents, four memoranda prepared by government attorneys which were thought relevant to the Attorney General's pre-complaint determination. After a motion by the United States to modify the subpoena to exclude these documents was denied, the United States refused to produce the memoranda on the ground that they fell within the non-disclosure privilege of 28 C.F.R. 16.11-16.14 and that the Attorney

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[1] The same method of citation to the record is used in this brief as in the petition for a writ of certiorari to which this brief is submitted in opposition. See footnote 1 at page 4 of the petition for a full explanation. This method of citation was used by both parties before the court of appeals. "Pet." refers to the petition for a writ of certiorari; "Pet. App." refers to the appendix to that petition.

General had directed that they not be produced (Vol. I, 20).

On August 7, 1969, the court dismissed the action with prejudice (Tr. August 7, 1969, pp. 219-220) on the grounds that the United States had refused to produce the four documents and "that the Attorney General did not have reasonable cause to bring this suit * * * unless said reasonable cause was shown by said four documents * * *" (Pet. App. 34).

On appeal, the judgment of the district court was reversed and the case was remanded for further proceedings. The court of appeals held that the basis for the Attorney General's "reasonable cause to believe" is not subject to judicial inquiry (Pet. App. 26-29) and rejected the union's contention that the four memoranda had been sought for "broader" reasons than to attack the Attorney General's determination of "reasonable cause" (Pet. App. 29-30).[2]

ARGUMENT

1. The court of appeals correctly held that the Attorney General's pre-complaint "reasonable cause" determination under Title VII of the 1964 Civil Rights Act is not subject to judicial review. The court's position is in accord with all other decisions on the question (see *United States* v. *Building and Construction Trades Council of St. Louis, Mo.*, 271 F. Supp. 454 (E.D. Mo.); *United States* v. *I.B.E.W., Local*

[2] The court of appeals ordered the district court to give the union, upon remand, an opportunity to show a legally relevant purpose for the production of the documents (Pet. App. 30).

309, C.A. No. 69-10 (E.D. Ill., July 2, 1969); *United States* v. *Jacksonville Terminal Company*, 68-239-Civ.-J. (M.D. Fla., October 18, 1968); *United States* v. *H. K. Porter Company, Inc.*, C.A. No. 67-363 (N.D. Ala., October 12, 1967)),[3] and is amply supported by the statute's legislative history. For example, on July 2, 1964, immediately before the House of Representatives passed the Civil Rights Act of 1964, Congressman Celler, the House floor manager of the bill, stated (110 Cong. Rec. 15895):

> Finally, the statute contains the usual directive to the Attorney General that he should have a reasonable case before he sues, but of course, he—not the court—decides whether reasonable cause exists, and the issue of reasonable cause does not present a separate litigable issue.[4]

Moreover, the courts have uniformly held that analagous determinations made by the Attorney General

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[3] On a related question, the courts have held that there is no requirement under Title VII that the Attorney General plead his "reasonable cause to believe." See *United States* v. *I.B.E.W., Local 683*, 270 F. Supp. 233 (S.D. Ohio); *United States* v. *Building and Construction Trades Council of St. Louis, Mo.*, 271 F. Supp. 447 (E.D. Mo.). See also *United States* v. *Gustin-Bacon Div., Certain-Teed Prod. Corp.*, 426 F.2d 539 (C.A. 10), certiorari denied, 400 U.S. 832.

[4] The legislative history cited by Petitioner (Pet. 15) is not relevant, since the quoted statements merely indicate that before bringing suit the Attorney General must have determined there is "reasonable cause", without discussion of whether that determination is subject to judicial review and inquiry. Petitioner's reliance (Pet. 16) on *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, is similarly misplaced.

under other civil rights statutes are unreviewable.[5] The judicial interpretation of these statutes is sound, in light of the fact that the Attorney General's determination of "reasonable cause to believe" merely commences the lawsuit, but has no other legal effect on the rights or liabilities of any party or person concerned. In view of the settled nature of the construction of Title VII applied by the court of appeals, there is no reason for further review by this Court.

2. In the alternative, the union contends that even if the Attorney General's "reasonable cause" determination does not constitute a separate litigable issue, access to the four memoranda should have been granted because an independent basis for their need existed (Pet. 19-24). The court of appeals correctly noted that the record does not support this argument but, rather, shows that the union sought discovery of the documents to support its view that the Attorney Gen-

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[5] See, *e.g.*, *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (C.A. 5); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817 (C.A. 5) (42 U.S.C. 2000c-6(a), authorizing the Attorney General's institution of school desegregation suits upon receipt of complaints which he "believes * * * meritorious"); *Kennedy* v. *Lynd*, 306 F.2d 222 (C.A. 5), certiorari denied, 371 U.S. 952 (Attorney General's "basis and purpose" for demanding access to voting records pursuant to 42 U.S.C. 1974b); *United States* v. *Gray*, 315 F. Supp. 13 (D.R.I.) (42 U.S.C. 2000a-5(a), Attorney General's "reasonable cause to believe" a violation of public accommodations section of Act has occurred); *United States* v. *Mitchell*, 313 F. Supp. 299 (N.D. Ga.) (42 U.S.C. (Supp. V) 3613, Attorney General's "reasonable cause to believe" that fair housing provisions of the Act have been violated).

eral lacked "reasonable cause" to bring the lawsuit.[6] Because the decision on this question is amply supported by the record and, in any event, has no impact beyond this lawsuit (in which the issue is subject to further consideration on remand, see n. 2, *supra*), this aspect of the decision below does not warrant review by this Court.

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[6] For example, during argument on the union's motion to dismiss, the union's counsel said: "[T]he argument on reasonable cause and argument on their failure to produce * * * are inextricably interwoven. They are part of the same thing. They [the United States] are saying they are challenging the right to inquire into reasonable cause. They are challenging the right of the Court to direct them to produce evidence in respect to reasonable cause." (Tr. August 7, 1969, p. 167.) See also the discussions between counsel and the district court at the time of the government's motion to modify the subpoena (Tr. August 6, 1969, pp. 5-7, 10-11, 15-16, 48, 54-55, 57), and the exchanges which occurred when the United States, in connection with its motion to modify the subpoena, urged the court to reconsider its ruling on the reviewability of the Attorney General's pre-complaint determination (*id.*, pp. 20-21).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1971.

CERTIORARI DENIED N.C.R.

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